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UNITED STATES OF AMERICA

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August 25, 2000

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201-A)
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits

Dear Sir or Madam:

These comments are being filed on behalf of the U.S. Chamber of Commerce ("U.S. Chamber"), the world's largest business federation, representing more than three million businesses of every size, sector, and region. The U.S. Chamber serves as the principal voice of the American business community.

The U.S. Chamber's members are subject to environmental requirements established and enforced by the U.S. Environmental Protection Agency ("EPA" or "the Agency"), and are therefore potentially affected by two guidance documents published for public comment on June 27, 2000 in the *Federal Register*: the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits."[1]

The U.S. Chamber strongly endorses and supports anti-discrimination measures, particularly the concepts included in Title VI of the Civil Rights Act of 1964 ("Title VI," "the Act," or "Civil Rights Act"). Title VI is explicit – the U.S. government will not tolerate discrimination in programs it funds:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[2]

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[1] *See* 65 Fed. Reg. 39682 (June 27, 2000). In this correspondence, the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" is referred to as "Recipient Guidance" and the "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" is referred to as "Investigation Guidance." References to both documents are identified as the "Recipient and Investigation guidance documents" or "guidance documents."

[2] 42 U.S.C. § 2000d.

However, the U.S. Chamber strongly asserts that EPA's guidance documents are fundamentally flawed for three key reasons.

1. Rather than providing needed guidance to states to ensure that federally-funded environmental *programs* comply with Title VI, EPA unfairly targets the environmental *permits* of lawfully compliant businesses and whether the operations of the business impact the states ability to secure environmental justice. The Agency's approach is radically inconsistent with Title VI, U.S. Department of Justice ("DOJ") and EPA Title VI implementing regulations, and recent case law.
2. The Agency has ignored the important, substantive recommendations of the U.S. Civil Rights Commission ("the Commission") to improve Title VI implementation.
3. EPA's approach also fails to provide states that administer EPA-delegated permit programs with the guidance necessary to eradicate unintentional discrimination resulting from facially-neutral policies as required by Title VI and recommended by the Commission.

Due to critical flaws, EPA must abandon all efforts to implement these guidance documents and immediately initiate efforts to develop environmental justice regulations and guidelines that conform to the Title VI, DOJ and EPA regulations, and the Commission's recommendations.

I. Title VI and regulations implemented by DOJ and EPA prohibit discrimination in state programs, but the guidance documents target only state-issued permits.

Provisions of Title VI and DOJ and EPA regulations provide the Agency with clear authority to redress discriminatory practices in federally assisted programs. EPA is empowered to terminate federal assistance to state environmental programs that engage in discriminatory practices. EPA should exercise this authority whenever states are found to operate intentionally or unintentionally discriminatory programs. EPA's focus, however, must be on the state program rather than any specific permit.

A. Title VI mandates that state programs do not discriminate.

Pursuant to Title VI, each federal agency is required to promulgate rules, regulations, or orders to implement Title VI. States that receive federal funds and do not comply with Title VI and implementing regulations face:

- Termination of or refusal to continue assistance under such program or activity;[3] or
- Civil or criminal prosecution as authorized by law.[4]

Termination of funding is the ultimate Title VI remedy. The Act, however, encourages negotiation between a federal agency and recipient to remedy Title VI violations on a voluntary or negotiated basis.

Since the Act is directed against discriminatory state and local government programs or activities receiving federal assistance, Congress withdrew state immunity from lawsuits in federal court under the Eleventh Amendment of the Constitution.

B. DOJ leads and coordinates federal Title VI compliance.

The President is required to implement Title VI. Under Executive Order 12250, the President delegated coordination of implementation and enforcement of nondiscrimination laws to the Attorney General of the United States. Therefore, the Attorney General, who heads DOJ, is required to develop standards and procedures for Title VI enforcement, as well as for undertaking investigations and compliance reviews. DOJ-promulgated regulations and guidance mandate that each federal agency responsible for implementing Title VI issue appropriate implementing directives that are consistent with DOJ requirements and describe the nature of Title VI coverage, methods of enforcement, examples of prohibited programmatic conduct, and suggested remedial actions.[5]

1. Regulations require continuing Title VI compliance.

DOJ procedures require federal agencies that distribute financial assistance to determine whether recipients comply with Title VI. This review process includes several necessary safeguards to ensure that funding is not made to programs that discriminate.

- *Application review* – Before awarding financial assistance, a federal agency must make a written determination that the recipient complies with Title VI. This determination is based on an assurance of compliance and data submitted by the applicant in accordance with DOJ guidelines.[6]

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[3] 42 U.S.C. § 2000d-1.
[4] *Id.*
[5] 28 C.F.R. §§ 42.401 – 42.415.
[6] 28 C.F.R. § 42.407(b). *See also* 28 C.F.R. 50.3.

- *Post-approval review* – Federal agencies must establish and maintain effective compliance review procedures to ensure that recipients, including those seeking continuing or renewal of assistance, administer federally-assisted programs in compliance with Title VI. Federal agency personnel are required to implement policies that establish appropriate review procedures and standards after the grant has been awarded. The regulations encourage federal agencies to integrate Title VI into general program reviews and audits. Also, federal agencies must prepare compliance status reviews that include specific findings and recommendations.[7]

- *Continuing state programs* – State agencies administering programs receiving continuing assistance must establish Title VI compliance programs for the agency and other sub-recipients receiving federal funds through it.[8]

2. Sanctions for noncompliance are severe.

DOJ's regulations require agencies to take prompt action to address non-compliance. Consistent with Title VI, the rules encourage voluntary compliance, but specify sanctions if compliance cannot be voluntarily achieved:[9]

- *Ultimate sanctions* – As a last resort, a federal agency may terminate or refuse to grant assistance. Before this can occur, the agency must determine that compliance cannot be secured by voluntary means, consider alternative ways to achieve compliance, and afford the applicant a hearing.[10]

- *Court enforcement* – A federal agency may sue a recipient or applicant for federal assistance to obtain specific enforcement of assurances filed with the application for financial assistance or to enforce compliance with Title VI or other constitutional or statutory provisions.[11]

- *Administrative action* – Other sanctions include cooperation among federal agencies or state and local governments to enforce nondiscrimination requirements, or bypassing a recipient that is violating Title VI to provide assistance directly to an ultimate beneficiary.[12]

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[7] 28 C.F.R. § 42.407(c).
[8] 28 C.F.R. § 42.410.
[9] *See* 28 C.F.R. § 50.3.
[10] 28 C.F.R. § 50.3(I)(A).
[11] 28 C.F.R. § 50.3(I)(B)(1).
[12] 28 C.F.R. § 50.3(I)(B)(2).

C. Environmental Protection Agency regulations follow DOJ rules.

In 1984, EPA promulgated its regulations to implement Title VI and DOJ regulations.[13]

1. Congress authorizes states to administer federal environmental programs.

The Agency's "recipients" typically are states that administer federally-funded environmental programs. States are authorized to apply to EPA to administer federal environmental programs pursuant to the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act and other environmental statutes. If EPA authorizes the state to administer the federal environmental program, it also provides federal financial assistance to the state.

EPA can deny the award of assistance to any state program that does not comply with Title VI or it can terminate financial assistance to that state at a later date if the state fails to properly implement Title VI.

2. EPA's regulations specify pre- and post-application Title VI compliance.

Pursuant to DOJ regulations, EPA promulgated regulations to implement Title VI that are consistent with DOJ provisions:

- *Preaward compliance reviews* – EPA will review information provided by applicants for federal financial assistance to determine Title VI compliance. EPA is to conduct an on-site review if the Agency believes discrimination may be occurring in a program or activity that is the subject of the application. A written agreement between a state agency and EPA must be signed before EPA can make any award. These agreements are not indefinite; they must be renewed after a specified period of time.[14]
- *Postaward compliance* – EPA's regulations require it to periodically request information from recipients regarding the programs for which federal financial assistance is provided. On-site reviews may be conducted if the Agency believes discrimination is occurring. As part of the process, EPA is to provide recipients with notice of Title VI violation allegations and provide an opportunity for states to respond. To address noncompliance,

[13] 40 C.F.R. § 7.
[14] 40 C.F.R. § 7.110(a).

voluntary efforts to achieve compliance are encouraged. If voluntary compliance cannot be achieved, EPA may initiate formal enforcement procedures.[15]

- *Complaint investigations* – Once EPA selects a recipient for a Title VI compliance review, the Agency must follow certain administrative procedures. EPA can also conduct investigations upon complaints from people who are part of a class that they believe has been discriminated against in violation of Title VI.[16]
- *Enforcement* – Informal resolution of Title VI violations is encouraged, but if informal resolution cannot be achieved, EPA may terminate, suspend, or annul assistance or employ any other means authorized by law to achieve compliance, including a referral of the matter to DOJ. If EPA terminates, suspends or annuls financial assistance, a formal hearing procedure before an administrative law judge is required. However, termination of assistance does not become effective until 30 days after EPA has provided a report describing the circumstances of such action to committees of Congress with appropriate jurisdiction.[17]
- *Reinstatement* – If the recipient satisfies the terms of eligibility contained in the termination order and provides reasonable assurances that it will comply with Title VI in the future, assistance can be reinstated.[18]

D. Recent case law clarifies the application of Title VI.

On December 22, 1999, the U.S. Court of Appeals for the Third Circuit clarified key Title VI concepts in the *Cureton v. National Collegiate Athletic Association* decision.[19] The Third Circuit concluded that the scope of disparate impact regulations under Title VI is limited to "recipients" of federal financial assistance, not others that have a mere relationship with entities receiving assistance.

The case dealt with a challenge to minimum scholastic aptitude test score requirements for freshman year varsity intercollegiate athletic participation and an allegation of a disparate impact. The Third Circuit found:

> [A] court should be circumspect in imposing Title VI obligations on an entity which is not a direct recipient of federal financial assistance.[20]

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[15] 40 C.F.R. § 7.115.
[16] 40 C.F.R. § 7.120.
[17] 40 C.F.R. § 7.130.
[18] 40 C.F.R. § 7.135.
[19] Cureton *v.* National Collegiate Athletic Association, No. 99-1222 (3rd Cir., December 22, 1999).
[20] *Id* at 19.

This decision confirms that Title VI regulations are "only related to programs or activities receiving Federal financial assistance."[21] The Third Circuit continued:

> [W]e emphasize that under the applicable regulations only "recipients" of Federal financial assistance are subject to the disparate impact regulations, not merely organizations which have some relationship with entities receiving such assistance or organizations which benefit from such assistance.[22]

Furthermore, the Third Circuit went on to determine that the requirements of Title VI are similar to the Rehabilitation Act of 1973 that described the relationship between a federal agency and a recipient of federal funds as "contractual." This contractual relationship limits Title VI coverage to recipients because only recipients of federal financial assistance can accept or reject Title VI obligations.[23]

II. The Commission on Civil Rights provides scores of recommendations to improve EPA's Title VI procedures that the Agency has failed to implement.

The Civil Rights Act of 1964 was established at a point in American history when racism and discrimination were prevalent, obvious and often state-sanctioned. The Act has been an extremely powerful tool to reduce discrimination in activities that receive federal funds. The U.S. Chamber is a strong supporter of these efforts.

A. Commission report critical of EPA Title VI implementation.

In 1996, the Commission undertook a review of federal departments and agencies responsible for implementing Title VI. In its report entitled "Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs,"[24] the Commission concluded that "The Federal Government has a moral imperative to ensure that its programs are operated and administered without discrimination… This report contains numerous, *detailed recommendations that must be implemented*…to ensure uniform, comprehensive, and meaningful enforcement of Title VI [emphasis added]."[25]

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[21] *Id.*, at 14
[22] *Id.*, at 18
[23] *Id.*, at 19. *See also* 29 U.S.C. §794
[24] *See* U.S. Commission on Civil Rights, "Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs," June, 1996. Chapter 11 focuses on EPA.
[25] *Id.*, Letter of Transmittal.

With respect to EPA, the Commission expressed "serious concern" at the Agency's lack of sufficient Title VI regulations, guidelines, and procedures for delegated state programs. As an example, it cited an EPA official who conceded the Agency, "has never effectively examined the Title VI compliance activities of continuing State programs."[26] Also, the Commission found EPA's Title VI implementation regulations and procedures deficient and confusing.[27]

B. Report offers 29 recommendations to improve EPA Title VI implementation.

From regulations and guidelines, to budget and staff training, the report's recommendations include many facets of EPA's Title VI and environmental justice programs. EPA is attempting to implement some of the recommendations. However, with respect to assistance to states administering EPA-delegated programs, which is the most critical aspect of EPA's Title VI program, representing 80 percent of all EPA-administered funds, the Agency completely ignores the Commission's recommendations with the issuance of the guidance documents.[28]

C. Findings and Recommendations of the Civil Rights Commission on EPA's Implementation of its Title VI Program.

Some of the findings and recommendations of the Civil Rights Commission Report ignored by EPA:

- EPA's Title VI activities do not follow the DOJ Title VI regulations which set forth the appropriate process for implementing Title VI and which are followed by most other federal agencies;[29]
- EPA's regulations do not explicitly prohibit discrimination in activities conducted in a facility built with federal funds such as wastewater treatment plants;[30]
- EPA has not issued guidelines for any of its federally assisted programs as required by DOJ; therefore, EPA does not provide the guidance necessary for states to comply with Title VI;[31]
- EPA only performs pre-award reviews of the applications for funds in the State Revolving Fund program but does not conduct a pre-award review for other

[26] *Id.*, at 435.
[27] *Id.*, at 426, 428.
[28] For individual findings and recommendations, *see id.*, at 439-452.
[29] *Id.*, at 426.
[30] *Id.*, at 427.
[31] *Id.*, at 428.

grant programs such as the federally delegated environmental programs authorized by specific statutes;[32]

- EPA conducts virtually no post-award reviews of its recipients;[33]
- For the time period of the Civil Rights Commission Report (1976-1993), there is no EPA federal assistance case that resulted in deferral, suspension, or termination of federal funds to a state environmental program;[34]
- Although 80 percent of all of the funds administered by EPA go to continuing state environmental programs, EPA has failed to issue regulations, guidelines, policies, or procedures that instruct a state as to how to comply with Title VI;[35]
- EPA does not require states to submit methods of administration showing how they intend to ensure compliance with Title VI;[36]
- An EPA official admitted that the Agency: "has never effectively examined the Title VI compliance activities of continuing State programs;"[37]
- EPA does not review state Title VI compliance criteria as part of its compliance reviews;[38]
- EPA admits that its failures to implement its Title VI program in compliance with DOJ guidelines raises the issue of whether it is legally liable for failure to enforce Title VI;[39]
- EPA does not demand Title VI compliance assurance statements from states as required by DOJ regulations and guidance;[40]
- EPA does not even have a system to review state environmental assurances of compliance with Title VI, nor does the Agency monitor state compliance with Title VI;[41]
- EPA's Title VI implementation plans: "do not fulfill the purposes envisioned by the Department of Justice" and its plan is "superficial;"[42] and

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[32] *Id.*, at 429-430.
[33] *Id.*, at 430.
[34] *Id.*, at 432.
[35] *Id.*, at 435.
[36] *Id.*
[37] *Id.*
[38] *Id*
[39] *Id.*
[40] *Id.*, at 446.
[41] *Id.*, at 436.
[42] *Id.*, at 437.

- EPA does not provide states with any examples of the types of activities that would ensure compliance with Title VI.[43]

The Civil Rights Commission Report sets forth many other findings and recommendations for EPA to implement Title VI and the DOJ regulations and guidelines. EPA ignores this very thoughtful and comprehensive report and instead travels its own path into regulating permit holders. In addition, EPA avoids its primary task to ensure that state programs and activities receiving federal financial assistance are in compliance with Title VI before funding is awarded and that that the recipients' program remains in compliance after funding is awarded.

III. EPA even fails to achieve its stated goal to provide a framework for states to identify and eradicate unintended discrimination in the administration of federally delegated environmental permit programs.

Instead of following the Commission's blueprint for implementing Title VI in a manner consistent with Congressional intent, EPA is pursuing a radically different approach. In the guidance documents, EPA proposes to establish a Rube Goldberg scheme, which completely avoids Title VI review of state plans and assurances before providing financial assistance and the post-award review process. Instead, EPA focuses on attempting to uncover discrimination on a permit-by-permit basis by reviewing a permit in light of the accumulated impact of all permits issued in a particular area. This approach is not only inconsistent with Title VI and DOJ regulations, but it utterly fails to recognize the many real factors (i.e. historic operations, proximity to transportation, available workforce, taxes, location of customers) that impact the reasons for a company operating in a particular area.

A. EPA's Guidance Documents.

1. EPA's Recipient Guidance provides little assistance for states to eliminate discrimination.

According to EPA, its Recipient Guidance provides states with strategies for addressing Title VI issues arising solely from environmental permitting:

- *Comprehensive Approach* – Through this approach, states would adopt a broad approach to improve existing processes by integrating Title VI

[43] *Id.*, at 443.

activities described in the guidance documents into existing permit-processing procedures.[44]

- *Area-Specific Approaches* – EPA envisions that through implementation of area-specific reviews, states will identify geographic areas with adverse disparate health impacts or other Title VI concerns. In this way, trends among communities with different racial makeup can be compared to determine if minority communities suffer adverse disparate impacts.[45]

- *Case-by-Case Approach* – This approach would require states to develop permit-specific approaches if circumstances warrant. One example described by EPA asserts that states could develop general criteria to evaluate permit actions likely to cause Title VI concerns.[46]

However, EPA in effect demands that states utilize Area-Specific Approaches since the guidance documents only provide one-paragraph descriptions of the Comprehensive and Case-by-case approaches.[47]

Moreover, the Agency asserts it will usually end Title VI investigations when EPA determines that a permit triggering an allegation is in an area covered by an EPA-approved area-specific agreement. States that choose different approaches – including states that eradicate discrimination – could face Title VI reviews and interference in permitting if Area-Specific Approaches are not implemented.[48]

2. EPA's Investigation Guidance describes EPA procedures.

Complaints alleging Title VI violations will be processed through the framework proscribed by the Investigation Guidance. These allegations will be either discriminatory human health or environmental effects resulting from the issuance of permits, or discrimination during the public participation process associated with the permit.

The Investigation Guidance does not include specific remedies for violations of Title VI or EPA regulations. It does, however, provide options that EPA can employ depending on case specific information by specifying procedures the Agency will use to process Title VI complaints, resolve them when possible through formal or informal measures, and terminate funding when resolution

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[44] *Id.*, at 39657.
[45] *Id.*
[46] *Id.*
[47] *See id.* In contrast, there are 40 specific references to Area-Specific Approaches in the *Federal Register* notice.
[48] *Id.*, at 39676.

cannot be achieved. The Investigation Guidance specifies that, consistent with Title VI, informal resolution is preferred.[49]

3. Adverse Disparate Impact Analysis review is the key to Investigation Guidance.

EPA has developed procedures to evaluate alleged violations of Title VI through the Adverse Disparate Impacts Analysis process. This portion of the Investigation Guidance is described as an analytical framework that will be adapted to address the particular characteristics of each complaint. At the end of this review, EPA will determine appropriate remedies which could include restrictions on environmental permits that are in addition to the factors typically considered by state agencies evaluating new environmental permits, permit renewals, or modifications.

As a clear example of a condition that may be imposed on a company that exceeds EPA's authority under environmental statutes, EPA asserts that as part of an area-specific agreement it could require:

> [C]eiling[s] on pollutant releases with a steady reduction in those pollutants over time. The period of time over which those reductions should occur will likely vary with a number of factors, including the magnitude of the adverse disparate impact, the number and types of sources involved, the scale of the geographic area, the pathways of exposure, and the number of people in the affected population. It is worth nothing, however, that pre-existing obligations to reduce impacts by environmental laws (*e.g.*, "reasonable further progress" as defined in the Clean Air Act section 171 (1)) might not be sufficient to constitute an agreement meriting due weight.[50]

As a result, EPA, through the system established with these guidance documents, would establish discharge ceilings or force states to implement other restrictions for the discharge of substances specified in the agreement that exceed the authorities granted it under the environmental statutes and which are based on problems caused throughout the area rather than by the facility which is the subject of the environmental justice complaint.

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[49] *Id.*, at 39669.
[50] Id., 39657.

4. Permit holders are subject to EPA enforcement due to state discrimination.

The Investigation Guidance process focuses on remedies to redress discrimination arising from the long term operations of a facially-neutral state environmental permitting decision. EPA's guidance attempts to reduce discrimination by focusing on facilities that operate in areas that may not be in attainment with all environmental laws. To achieve what EPA believes to be environmental justice, it will subject companies operating in these areas to:

- Denial of permits;
- Limitations on operations or facility size and scope; and
- Imposition of measures beyond "matters ordinarily considered in the permitting process" on permit holders and applicants.[51]

Pursuant to the guidance documents, the permit holder becomes the entity that must atone for a state's discriminatory practices or the historical pollution within a community – even though the permit holder is in full compliance with all applicable environmental laws and regulations and no way responsible for a state's discrimination. Neither EPA, which has failed to provide guidance to states to eradicate facially-neutral discrimination, nor state governments, which may have unintentionally allowed discrimination in their programs, suffer consequences. Under the guidance documents, states that have allowed discrimination will not even be required to amend their procedures to prevent discrimination in the future.

B. EPA's approach is legally and fatally flawed.

EPA's approach to implementing Title VI is legally and fatally flawed because it focuses on permits and the accumulated impact of environmental permits issued in a specific geographic area rather than on the difficult task of reviewing grant applications and monitoring the use of federal funds by state environmental programs. This fatal flaw transfers the focus of EPA's attention to the permit holder and away from the recipient of federal financial assistance. Moreover, it drastically minimizes the expertise of DOJ and the Commission on matters within their fields of expertise. EPA's focus on the permit holder and its avoidance of DOJ and the Commission's guidance highlights and makes particularly relevant the severe criticisms of the Agency in the Commission's Civil Rights Report.

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[51] *Id.*, at 39674 (June 27, 2000).

1. Permit holders are not recipients of federal financial assistance.

Permit holders cannot be considered recipients of federal financial assistance because neither EPA nor the state has provided the permit holder with any direct or indirect financial assistance.[52] Instead, when a state approves a permit, the permit holder receives a legal right to operate in accordance with the permit conditions. Therefore, by applying Title VI provisions directly to permit holders or applicants, EPA avoids its legal obligation to ensure that federally-funded state programs do not discriminate on the basis of race, color, or national origin. Such legal obligations can be most easily met by implementing the intent of Title VI, the regulations and guidance of DOJ, and the recommendations of the Commission.

2. Guidance documents cannot modify the EPA-state relationship established by Title VI and DOJ.

The guidance documents radically alter the relationship between EPA and state agencies that administer federal environmental programs by:

- Rendering the preaward and post-approval review procedures proscribed in DOJ and EPA regulations effectively moot;
- Requiring EPA and states to implement procedures to review of areas where state facially-neutral permitting programs may potentially discriminate in lieu of the ongoing compliance review procedures specified in DOJ and EPA regulations; and
- Mandating that states include conditions in specific permits that exceed statutory and regulatory environmental requirements.

Although the guidance documents are not legally binding, EPA threatens that unless states comply with the provisions of the guidance documents, states will not be accorded "due weight" when assessing Title VI.[53] Therefore, states that do not follow the guidance documents to the letter – even states that administer discrimination-free programs – face enforcement by EPA under the guidance documents and loss of financial assistance.

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[52] *See* Cureton *v* National Collegiate Athletic Association, *infra* at 6.
[53] 65 Fed. Reg. 39663 (June 27, 2000)

3. Area-Specific provisions parallel the Interim Guidance, which was prohibited by Congress from being implemented.

The concepts included in the guidance documents are not new; they draw heavily from EPA's February 1998 "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits ('Interim Guidance')." Although much less detailed than the Recipient and Investigation guidance documents, the Interim Guidance required states to identify specific geographic areas with alleged adverse disparate health impacts. [54]

The Interim Guidance was severely criticized by governors, mayors, other state and local government officials, community leaders, business, small businesses and interest groups such as the National Black Chamber of Commerce, National Association of Black County Officials, and Environmental Council of the States. The U.S. Chamber, too, was highly critical of the Interim Guidance, arguing that it undercut a decade of efforts to bring business into low income and minority areas and to provide job training to citizens in those depressed areas.

EPA's policies would have encouraged lawsuits against local businesses, while attempting to remedy conditions that may not have been in any way caused by businesses then-operating in those areas. Such policies would cause existing businesses to flee low income and minority communities because they would have been subject to conditions far more adverse than businesses operating in other locations.[55]

Responding to these concerns, Congress imposed restrictions that ultimately became law barring EPA from using appropriated funds to implement or administer the Interim Guidance. The restrictions, however, allowed EPA to develop final Title VI guidance.[56]

Rather than using DOJ regulations and guidance and the Commission's recommendations as a blueprint for the Investigation and Recipient guidance

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[54] U.S. Environmental Protection Agency, "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits," January 23, 1998.

[55] On May 1, 1998, the U.S. Chamber appealed directly to the President to request that EPA withdraw the guidance documents because of the impacts on the significant adverse impact that the Interim Guidance would have had on American prosperity and our common commitment to spurring economic growth and job opportunities in low-income and minority communities.

[56] *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276 (1998) *and* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000, Pub. L. No. 106-74 (1999).

documents, the Agency has attempted to re-impose using different words the Interim Guidance that Congress found so deeply flawed.

IV. Not only are EPA's guidance documents inconsistent with Title VI and DOJ regulations, but the approach will have disincentives for economic development in minority communities.

If the guidance documents are implemented by EPA, businesses in minority and low-income communities could be forced to close. Jobs and prospects for improved economic prosperity in these areas will be lost. Such a loss would be unfortunate after the many decades of federal effort to bring jobs and worker training to these areas through empowerment zones, enterprise communities, and job training activities.

Environmental laws and regulations often require facilities to modernize their equipment to meet new pollution control requirements. EPA alone issues approximately 500 new regulations annually and these new mandates require new permits or permit modifications that, under the guidance documents, will subject the facility to an environmental justice inquiry. Every attack alleging violations of EPA's environmental justice guidelines subjects the facility to the risk of loss of permit or to permit conditions that exceed what can be imposed by environmental regulations. As such, facilities will be less likely to operate in areas where their permits can be attacked on a routine basis.

Instead of providing guidance to states to eliminate unintended discrimination, EPA's reliance on the Area-Specific Approaches will force states to identify locations that may be in non-attainment with an environmental law or regulation. The guidance documents will create a disincentive for facilities to locate or expand in non-attainment areas - many of which have large minority or low-income populations. The disincentives are:

- *Uncertainties for permit holders* – The certainty statutes, regulations, guidance documents and permit conditions provide permit holders and applicants will be lost because the guidance documents focus on individual permit decisions. Virtually any permit action could trigger an adverse disparate impact review and any such review could result in the loss of an environmental permit.

- *Environmental compliance* – Compliance with environmental statutes or regulations does not guarantee Title VI compliance.[57] This means that even a

[57] *Id.*, at 39680, 39690.

facility that is in compliance with all environmental statutes could lose its right to operate.

- *No permittee role* – A permit holder (the company) has no formal role in the Title VI compliance process even though permittees may be forced to alter or suspend operations following the Title VI review. Simply, the impacted permittee does not even have the right to defend itself against charges of environmental racism.

- *Local planning, existing uses and market forces are ignored* – The reliance on the Area-Specific Approaches ignores local considerations that may be beyond the scope of state environmental permitting agencies. For example, zoning and existing patterns of development will have significant influences on other types of development; certain types of businesses may cluster because of availability of skilled workers, proximity to markets, or access to highway, rail, port, air, education or telecommunications infrastructure; and property values may also preclude certain types of development in certain communities. Under the guise of the Civil Rights Act, the guidance documents would establish EPA as a *de facto* national zoning and planning board capable of determining the types of businesses that could locate in a particular area. Title VI does not sanction EPA efforts to commandeer the land use planning authority of local governments.

- *EPA regulatory databases do not prove discrimination* – The Recipient Guidance specifies that states should use information from EPA databases such as Aerometric Information Retrieval System, Toxic Release Inventory, Total Maximum Daily Load, and Superfund National Priority List data to determine stressors that potentially contribute to disparate impacts on certain demographic groups. Using this approach, literally any area of the nation in non-attainment with any environmental program would trigger environmental justice actions for each permit reviewed by a state agency. Environmental justice would swallow up all environmental requirements.

- *Poor data quality* – The guidance documents specify that states identify areas where potential Title VI concerns may exist. Although technically rigorous geographic studies of alleged adverse disparate impacts that include ambient monitoring data, modeled ambient concentrations, and identification of known emissions incorporated are suggested, they are not required. Only "readily available and relevant data" is required for adverse impact assessments since "significant resources" are required to generate more detailed geographic estimates and measures. Furthermore, when "more detailed (*e.g.*, modeled)

estimates" are unavailable, EPA will allow "simpler approaches."[58] Therefore, it will be a common practice for environmental justice advocates to file claims using "simpler approaches," i.e. claims based upon data that is inaccurate; that has not been peer-reviewed and at worst is extremely out of date.

- *The disparity process can be exploited* – Intervenors, as long as they are members of a group discriminated against, can seek to stall projects and frustrate state permitting actions merely by filing claims with EPA. State project review will likely be suspended as EPA conducts an investigation – even if allegations are not substantiated. The guidance documents include few restrictions on individuals or groups that can file allegations of Title VI violations. Groups or individuals will use the environmental justice process to stop or delay projects, even those supported by the community, for many political, ideological or economic competitiveness reasons.[59] Moreover, since there is no minimum level of support that must be provided with a complaint for EPA to accept it, EPA is opening the floodgates, which will allow so many attacks on the environmental permitting system that the system will be rendered useless.

IV. Conclusion

Since EPA's guidance documents are so radically inconsistent with Title VI, DOJ and EPA regulations, and U.S. Commission on Civil Rights findings and recommendations, the U.S. Chamber strongly urges EPA to abandon all efforts to finalize the guidance documents. Instead, the Agency must expeditiously amend its existing regulations and subsequently issue appropriate guidance to implement the recommendations of the Commission's report in accordance with the regulations and guidance of DOJ. The clear focus of EPA's Title VI initiative should be to ensure that state environmental programs comply with the Title VI before it awards financial assistance to the states.

The U.S. Chamber thanks the Agency for soliciting the opinion of the U.S. business community concerning the draft guidance documents.

Sincerely,

William L. Kovacs

[58] *Id.*, at 39660, 39681.
[59] *Id.*, at 39672, 39696.